APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed February 12, 2002]

No. 97-56055

SAMUEL FIRESTONE; CALVIN MIYASHIRO; JACK PUTNAM; BRIAN FRAZEN, individually and on behalf of all other present and former employees similarly situated,

Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA GAS COMPANY,

Defendant-Appellant.

Before:

SCHROEDER, BEEZER, and GRABER, *Circuit Judges*.

OPINION

SCHROEDER, *Circuit Judge*:

The plaintiffs have filed a Petition for Rehearing and Suggestion for Rehearing En Banc contending that our court's intervening en banc decision in *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001) (en banc), *cert. denied*, 2002 WL 13239 (U.S. Jan. 7, 2002) (No. 01-432), requires us to hold that the plaintiffs have stated a state law claim for overtime pay. In *Cramer* we clarified our decisions with respect to preemption, an area that has become increasingly confusing in recent years. In *Cramer*, we overruled our cases that had held state law claims preempted where the state right in question was not the subject of any actual collective bargaining agreement provision, but was "'a

properly negotiable subject for purposes of collective bargaining.'" *Id.* at 692-93 (quoting *Util. Workers of Am. v. S. Cal. Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988)). We held that those cases applied preemption too broadly.

In *Cramer*, however, we reaffirmed the principle that a state law claim is preempted if it necessarily requires the court to interpret an existing provision of a collective bargaining agreement ("CBA") that "can reasonably be said to be relevant to the resolution of the dispute." *Cramer*, 255 F.3d at 693. A claim that requires only reference to the collective bargaining agreement, but no interpretation, is not preempted. *Id.* at 690 (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-13 (1988)).

In our original opinion in this case, we held that resolution of plaintiffs' state law overtime claim would require interpretation of the agreement, because plaintiffs are not entitled to any overtime under state law if they are paid a "premium" for overtime work above the "regular rate" of pay in the contract. *Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063, 1066 (9th Cir. 2000). The parties in this case disagree about which rate in the contract is the "regular" rate and, thus, disagree on whether plaintiffs are receiving a "premium" for overtime work. Resolving this question, we held, requires interpretation of the agreement. The agreement would be enforced differently depending on which party's interpretation is accepted.

We conclude that *Cramer* does not change this result. Resolution of plaintiffs' claim to overtime pay under state law cannot be decided by mere reference to unambiguous terms of the agreement. We are in agreement with a recent decision of the First Circuit, where the court noted:

> In many cases, however, the state law claims are "inextricably intertwined" with the meaning of terms in the CBA and are thus preempted by federal labor law.

> *Allis-Chalmers [Corp v. Lueck*, 471 U.S. 202, 213 (1985)]. In such instances, state law "must yield to the developing federal common law, lest common terms in bargaining agreements be given different and potentially inconsistent interpretations in different jurisdictions." *Livadas [v. Bradshaw,* 512 U.S. 107, 122 (1994)].

Adames v. Executive Airlines, Inc., 258 F.3d 7, 12 (1st Cir. 2001).

The panel as constituted above has voted to deny the petition for rehearing. Chief Judge Schroeder and Judge Graber have voted to deny the petition for rehearing en banc and Judge Beezer has so recommended. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing and the petition for rehearing en banc are therefore DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 19, 2000]

No. 97-56055

SAMUEL FIRESTONE; CALVIN MIYASHIRO; JACK PUTNAM; BRIAN FRAZEN, individually and on behalf of all other present and former employees similarly situated,
Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA GAS COMPANY,
Defendant-Appellant.

Argued Oct. 4, 1999

Before:

SCHROEDER, BEEZER, and GRABER, *Circuit Judges*.

OPINION

SCHROEDER, *Circuit Judge*:

This is a suit for overtime compensation under both federal and California fair labor provisions. The most significant issue on appeal is whether plaintiffs' state law claim for time-and-a-half of their regular hourly rate for all hours worked beyond eight in a day and forty in a week is preempted by section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a). On the merits, the employer argues that the claim is foreclosed by an exemption in the

California overtime law for employees who are covered by a collective bargaining agreement that provides, in relevant part, for "premium wage rates" for overtime work. The district court held that plaintiffs' claim was preempted by the LMRA because resolution of the essential dispute between the parties about the applicability of the California exemption required interpretation of the complex pay and overtime pay provisions in the collective bargaining agreement. The district court dismissed on the merits plaintiffs' claim under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* We affirm these rulings.

The Law of Preemption Under § 301

Section 301 of the LMRA provides in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

29 U.S.C. § 185(a). The Supreme Court ruled long ago that the legislative history of § 301 makes clear that Congress intended to have the federal courts create a body of federal common law to be used to adjudicate disputes arising out of labor contracts. *See Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). "[T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1, 23, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (punctuation omitted). A court's determination of whether a state law claim is preempted by § 301 "must focus . . . on whether [the state law claim] confers nonnegotiable state-law rights on employers or employees independent of any right established by contract,

or, instead, whether evaluation of the [state law] claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 213, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). Of course, not every dispute involving provisions of a collective bargaining agreement is preempted by the LMRA. *See id.* at 211, 105 S.Ct. 1904. When the meaning of particular contract terms is not disputed, the fact that a collective bargaining agreement must be consulted for information will not result in § 301 preemption. *See Livadas v. Bradshaw,* 512 U.S. 107, 123-24, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994) (citing *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399, 413 n. 12, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988)); *see also Audette v. International Longshoremen's and Warehousemen's Union,* 195 F.3d 1107, 1113 (9th Cir.1999). However, § 301 does preempt state law claims that are "substantially dependent" on an analysis of a collective bargaining agreement. *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 394, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

The Parties' Overtime Arrangement

In 1995, the plaintiffs' unions and the employer, Southern California Gas Company (SCGC), agreed to a compensation arrangement set forth in a document entitled "Pay-Per-Route (PPR) for Meter Reading and Meter Reading A/B Routes" (PPR document). Under the Pay-Per-Route system, all meter readers were paid flat sums for completing meter reading routes of assigned lengths, even if it took less than the estimated time to complete the routes. The flat sum for each route was calculated by multiplying the hourly rate set forth in the collective bargaining agreement ($16.56 per hour) by the amount of time it was expected to take to complete the route.

Meter readers who worked more than 8 hours in one day received an adjustment to the flat sum normally paid. The method of calculating compensation for these hours is the

subject of some dispute by the parties. According to the PPR document itself, the unassigned overtime hours posted were computed as follows: (assigned hours/actual hours) X .3334 X (actual hours-8). That figure was then multiplied by one and one-half the hourly rate set forth in the collective bargaining agreement and added to the flat rate for the assigned hours. SCGC contends that the total pay for a meter reader who worked unassigned overtime was actually calculated by dividing the flat sum by the total number of hours it actually took to complete the route to arrive at the employee's "regular rate" for that day. The meter reader would then receive one and one-half times that regular rate for hours worked beyond 8 per day, added to 8 times the"regular rate" for that day. The difference between the formula contained in the PPR document and that allegedly used by SCGC apparently resulted from the inability of SCGC's computerized payroll system to handle variable rates of pay. These formulae yield almost the same result, however, plaintiffs contend that under either one the defendant violates state wage and hour laws by failing to provide a "premium" wage rate for overtime work.

Discussion

The applicable California statute on overtime provides: "No employee eighteen (18) years of age or over shall be employed more than forty (40) hours in any workweek unless the employee receives one and one-half (1-1/2) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek." 8 Cal.Code Reg. § 11040(3)(A). An overtime exemption provision provides that the section quoted above "shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage." 8 Cal.Code Reg. § 11040(3)(D).

The district court held that one could not determine whether plaintiffs were receiving a "premium wage rate" for overtime under the collective bargaining agreement-making them exempt from California overtime laws-without interpreting that agreement to determine, *inter alia*, what the regular rate was. For the following reasons, we agree with the district court that resolution of this issue requires interpretation of the agreement, and that the state law overtime claim is therefore preempted.

According to plaintiffs, they are not paid a "premium rate" because the rate they ultimately receive for overtime hours is lower than the standard rate of $16.56 per hour used to calculate the flat rate for each route. Thus, argue plaintiffs, they actually receive lower wages for overtime hours than they receive for scheduled hours. On the other hand, because the employer perceives the "regular rate" to be the standard rate divided by the number of hours it actually takes plaintiffs to complete the route on any given day, the employer maintains that plaintiffs are paid a rate for overtime work that includes a "premium" equal to 50% of the regular rate for that day.

The parties therefore disagree on the meaning of terms in the collective bargaining agreement for purposes of California law. To resolve that dispute, it would be necessary to apply California law to determine the overtime rights and obligations of the parties to the agreement. The claim is not "independent" of the collective bargaining agreement under federal preemption law. *See Lingle,* 486 U.S. at 407, 108 S.Ct. 1877.

The Court in *Lingle* held that a state law claim of retaliatory discharge for exercising state Workers' Compensation rights was not preempted, because the dispute did not turn on the meaning of any terms in the collective bargaining agreement. It was irrelevant that a grievance could also have been filed and arbitrated pursuant to that agreement. The right

to be free of retaliatory discharge for filing a claim under the state Workers Compensation laws existed independent of the collective bargaining agreement.

In *International Broth. of Elec. Workers v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987), on the other hand, a claim under state law for breach of the duty to provide a safe workplace was preempted because the defendant's duty was defined by reference to the collective bargaining agreement. There was no duty independent of the collective bargaining agreement. The Court pointed out that if state law "were allowed to determine the meaning of particular contract phrases or terms in a collective bargaining agreement . . . the 'parties would be uncertain as to what they were binding themselves to' in a collective-bargaining agreement, and, as a result, 'it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate.'" *Id.* at 858, 107 S.Ct. 2161 (quoting *Allis Chalmers,* 471 U.S. at 211, 105 S.Ct. 1904).

This case illustrates that problem well, for if California law were to apply, the parties negotiating the agreement would not know whether the employer's overtime obligations were defined by the contract or not, depending on which rate a court determined was the "regular" rate under the California law. The claim is preempted.

Plaintiffs rely on *Livadas v. Bradshaw*, 512 U.S. 107, 123-24, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994). In that case, the Supreme Court held that a claim based on a state requirement for timely payment of severance pay was not preempted, because resolving the claim did not require any interpretation of the collective bargaining agreement; it required instead reference only to a calendar and the undisputed wage rate. *See* 512 U.S. at 121-25, 114 S.Ct. 2068. There were no terms in the statute to be interpreted with reference to the collective bargaining agreement, nor were there any terms of the collective bargaining agreement

to be interpreted in light of the statute. That is not so here. Because the collective bargaining agreement must be interpreted to determine whether the PPR document provides for premium wage rates for overtime work and, therefore, whether California's overtime exemption provision applies, *Livadas* is inapposite. Plaintiffs' state law claim is preempted by the LMRA.

In the alternative, plaintiffs maintain that the California premium rate exemption is itself preempted by federal law, because the exemption denies union employees benefits extended to non-union employees. Again, plaintiffs' reliance on *Livadas* is misplaced. In *Livadas,* the Court considered a state's policy of refusing to enforce the severance pay provisions as to all employees covered by collective bargaining agreements with arbitration clauses. The Court held that the policy was contrary to federal labor law because it burdened all employees who were subject to the collective bargaining and arbitration processes that federal law recognizes as significant. *See id.* at 117-18, 114 S.Ct. 2068. By contrast, the exemption from California's mandatory time-and-a-half overtime requirement is limited to those employees covered by collective bargaining agreements containing negotiated premium wage rates that are over and above regular wage rates in excess of the minimum wage. The exemption therefore applies only to those who have sought and received alternative wage protections through the collective bargaining process. The California statute as a whole thus "provides protections to individual union and nonunion workers alike, and thus 'neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA.'" *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 20-21, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985)).

The Supreme Court in *Livadas* recognized that opt-out provisions for negotiated alternatives to state-law standards are not in conflict with federal preemption law. These "familiar and narrowly drawn opt-out provisions" exempt employees covered by a collective bargaining agreement that contains a negotiated provision on the same subject but different from the statutory provision. *See Livadas,* 512 U.S. at 131-32, 114 S.Ct. 2068 (citing D.C.Code § 36-103 ("Unless otherwise specified in a collective agreement . . . [w]henever an employer discharges an employee, the employer shall pay the employee's wages earned not later than the working day following such discharge."); 29 U.S.C. § 203(o) ("Hours [w]orked" for Fair Labor Standards Act measured according to "express terms of . . . or practice under bona fide collective-bargaining agreement")); *see also Viceroy Gold v. Aubry,* 75 F.3d 482, 489-90 (9th Cir.1996) (holding that a California provision exempting from the maximum hour laws employees covered by a "valid collective bargaining agreement that expressly provides for the wages, hours of work, and working conditions of the employees" is not preempted by the NLRA).

Such an opt-out is essentially what California has adopted here. California's overtime exemption provision does not operate automatically to exempt virtually all union-represented employees from its coverage-it exempts only those who have bargained for an alternative overtime compensation scheme. We recognized as much in *National Broadcasting v. Bradshaw,* 70 F.3d 69, 73 (9th Cir.1995), which stated that an identical California overtime exemption was an opt-out provision not preempted under *Livadas.* Accordingly, California's overtime exemption provision is not preempted by federal labor law.

Plaintiffs also challenge the district court's dismissal of their claim for overtime pay pursuant to the FLSA. Section 207(a)(1) of the FLSA provides in part:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). Plaintiffs assert that defendant's practice of determining on a daily basis the rate upon which overtime compensation is based violates § 207(a)(1). According to the regulations, however, an employee's "regular rate" may be calculated on the basis of an employee's average earnings over one of any number of periods, including a day. *See* 29 C.F.R. § 548.3(b). Plaintiffs nonetheless argue that because the basic rate arrived at by defendant under the PPR document can "fluctuate wildly," SCGC's utilization of a daily rate cannot comply with 29 C.F.R. § 548.2(e), which plaintiffs claim mandates that an employee's basic rate will be "substantially equivalent" to the average earnings of the employee "over a representative period of time." The full provision states that the basic rate established by the employer must be "authorized by § 548.3 or . . . authorized by the Administrator under § 548.4 as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time." 29 C.F.R. § 548.2(e). What is therefore required by § 548.2(e) is that the basic rate used be either one permitted under § 548.3 or one specially authorized by the Administrator of the Wage and Hour Division of the Department of Labor pursuant to 29 C.F.R. § 548.4. Here, defendant's method of calculating a

regular rate upon which to base overtime compensation is specifically authorized by 29 C.F.R. § 548.3(b). Accordingly, it does not violate the FLSA.

Finally, plaintiffs contend that the district court erred by dismissing the federal and state law claims related to nondiscretionary bonuses which they raised for the first time in the first amended complaint. It is unclear from the record whether the district court inadvertently dismissed those claims without considering them. Accordingly, a remand is appropriate for proper consideration of these claims.

Costs on appeal are awarded to SCGC.

AFFIRMED IN PART AND REMANDED IN PART.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed July 14, 1998]

No.

SAMUEL FIRESTONE; CALVIN MIYASHIRO;
JACK PUTNAM; and BRIAN FRAZEN,
Plaintiffs,

v.

SOUTHERN CALIFORNIA GAS COMPANY,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I.

Introduction

In this action, plaintiffs, gas meter readers, seek class-wide relief from their employer, the Southern California Gas Company ("the Gas Company"), on the basis that the Gas Company's method of computing overtime pay and failure to schedule rest breaks violates state and federal wage and hour laws. Under the system at issue, gas meter readers were paid for the hours they were assigned to work rather than hours actually worked. Plaintiffs' First Amended Complaint alleges violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, for failure to pay time and one half for all hours worked in excess of forty per week, and violation of § 3(A) of Wage Order 4, Cal. Code Regs. tit. 8 § 11040, by failing to pay an overtime premium of one and one-half for all hours worked in

excess of forty hours per week and eight hours per day and for failing to permit rest breaks as required by Cal. Code Regs. tit. 8 § 11040. Plaintiffs seek compensatory damages, injunctive and declaratory relief.

Defendant's motion to dismiss the state overtime claim based on federal preemption of plaintiff's state law claim under § 301 of the Labor Management Relations Act ("LMRA") was argued December 15, 1997. Because the plaintiffs submitted declarations and documents that could not be properly considered on a motion to dismiss, the Court elected to treat defendant's motion as a motion for summary judgment under Fed. R. Civ. P. 56. The Court then allowed plaintiffs sixty days to conduct discovery on relevant factual issues, and ordered supplemental briefing.

The Court now concludes that plaintiffs' state law overtime claim is indeed preempted by § 301 of the LMRA. Plaintiffs are unable to state a claim under the LMRA because they failed to arbitrate this dispute as required by the collective bargaining agreements between the Utility Workers of America and the International Chemical Workers Union Council of the UFCW, AFL-CIO and the Gas Company. Furthermore, defendant is entitled to summary adjudication of plaintiffs' federal claim because there exist no genuine issues of material fact and defendant is entitled to judgment as a matter of law. With the resolution of plaintiffs' federal claims, the Court declines to exercise supplemental jurisdiction over the remaining state law claim based on defendant's alleged failure to provide rest breaks. Accordingly, defendant's motion for summary judgment is GRANTED as to the first and second claims for relief. The third claim for relief is DISMISSED without prejudice.

II.

Factual Background

Plaintiffs are members of a bargaining unit jointly represented by the Utility Workers of America, AFL-CIO, and by the International Chemical Workers Union Council of the UFCW, AFL-CIO (collectively, "the Unions"). The named plaintiffs in this action are represented by the Utility Workers.

The Gas Company and the Unions are parties to a series of collective bargaining agreements ("CBAs") establishing the wages, hours, and other terms and conditions of employment. The most recent CBA was effective from September 9, 1996 through March 31, 1998 ("the 1996 Agreement"). *See* Exh. 1 to Declaration of Alejandro Ahumada. The prior CBA was effective March 9, 1994 to March 31, 1996 ("the 1994 Agreement"). *See* Exh. 2 to Ahumada Declaration. Between April 1, 1996 and September 8, 1996, while the Unions and the Gas Company were negotiating a new contract, plaintiffs were not covered by a collective bargaining agreement. Declaration of Samuel Firestone Declaration, ¶ 6.

Part of the 1994 Agreement—a March 9, 1994 Letter of Agreement re: "Competitive Benchmarking of Functions"—gave the Gas Company the right to contract out the work of meter reading, but reserved for the Unions the right to match the savings generated by contracting out work to the lowest qualified contractor. *See* Exh. 1 to Ahumada Declaration at 210-215. The Gas Company, however, agreed not to contract out the work and to continue to employ meter readers if the Unions could match the savings, a process known as "competitive bench marking."

On March 29, 1995, the Gas Company and the Unions agreed through collective bargaining to change the way the Gas Company's meter readers performed their duties and agreed to change the method by which meter readers were

compensated. These changes were set forth in a document entitled "Pay-Per-Route ("PPR"] for Meter Reading and Meter Reading A/B Routes" ("PPR Document"). *See* Exh. A to Firestone Declaration. Under the PPR system, as of April 5, 1995, meter readers were no longer paid by the hour. Instead, all meter readers were paid a flat sum for performing an assigned meter reading route regardless of the actual time it took to complete the route. The value assigned to a route was calculated by multiplying the contractual hourly pay rate for a Pay Grade 3, $16.56 per hour, by the amount of time it was determined it would take to complete the route.[1] The PPR system was implemented "to help achieve cost savings in Meter Reading. Pay per route simply means that meter readers will be paid for hours assigned, not actual hours . . . ." Exh. A to Firestone Declaration, PPR Document at 4.

There are two types of routes—A and B. A Routes were predetermined to take eight hours to complete and were valued at $132.48 ($16.56 x 8 hours). B Routes were predetermined to take 6.75 hours to complete, and were paid a lower flat rate of $111.78 ($16.56 x 6.75 hours).

The "Calculating Overtime" section of the PPR Document provides "if assigned or actual hours exceed 8 hours in a single day, some form of overtime premium will be paid." PPR Document at 9. If a meter reader were to work more than eight hours in one day, the flat sum paid would be adjusted to reflect either "assigned" or "unassigned" overtime. Assigned overtime was work over eight hours that was necessary for completing a longer or more complicated route. Unassigned

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[1] "Route value is calculated according to industrial engineering concepts by determining, among other factors, the number of meters in a given route, geographical and topographical factors, the locations of the meters, and the speed in which a meter reader can walk at a fair pace. To this, time is added for preparatory and concluding activities at the base and 7.25% fatigue allowance, which calculates to thirty-five minutes over eight hours." Declaration of Mark L. Serrano, ¶ 9.

overtime was extra time required for slower meter readers, where there were excessive customer contacts, where there was unusually heavy traffic, where there were dogs in customers' yards, and other distractions that might delay timely completion of the route. If the extra hours were assigned, the meter reader would be paid at a rate of one and one half times the hourly rates for meter readers set forth in the 1994 and 1996 Agreements. According to plaintiffs, if the work in excess of eight hours were unassigned (a meter reader took longer than the eight hours he was supposed to take to complete the A Route or took more than one and one-quarter hours longer than the 6.75 hours fixed for B Routes), the following formula applied: (assigned hours ÷ actual hours) x 0.3334 x (actual hours - 8) = overtime hours posted. This is the formula in the PPR Document. The .3334 factor is calculated by dividing 1.5 (overtime rate is time and one half) into .5—.5 ÷ 1.5 (the premium over straight time). The justification for this formula is that an overtime hour is compensated by .5x "straight time" and overtime hours and paid at 1.5x straight time. PPR Document at 10. Using this formula, a meter reader assigned an eight hour route who actually worked ten hours was paid for .5 overtime hours ((8 ÷ 10) x .3334 x (10 - 8) = .53344 or ½ hour overtime), not two hours. *See* Appendix A to PPR Document.

According to the Gas Company, this formula is not compatible with its automated payroll system. Instead, unassigned overtime is calculated according to the following formula: The regular rate of pay is computed by dividing the number of hours actually worked into the fixed value of the route. Then this hourly rate is used to compute overtime at 50% of the employer's regular rate. The longer a meter reader takes to complete the route, the smaller his or her hourly rate on which the time and one half is based. The only difference between the formula in the PPR Document and this one is that the PPR formula is set in terms of payroll hours. The two

formulas yield the same result. Under the Gas Company's reported method, a meter reader who took ten hours to complete an eight hour A route would be paid $132.48 ÷ 10 = $13.25 per hour, and 50% of that would be $6.62, yielding an overtime hourly rate of $19.87. The total amount paid would be ($13.25 X 8 straight hours) + ($19.87 X 2 overtime hours) = $145.74.

The formula actually used by the Gas Company is the only factual issue in dispute,[2] and it is does not rise to the level of a genuine issue of material fact because the result is the same using either formula.

The Unions did not sign the agreement regarding the method of compensation for meter readers set forth in the PPR Document signed by the Gas Company February 13, 1996, because they believed the system was unfair and possibly illegal. *See* Ahumada Declaration, ¶¶ 7-8 and Exh. 4.

The Gas Company reports that its studies, which have not been filed with the Court, show that meter readers work an average of seven hours three minutes per day plus thirty-five minutes compensated rest time and that 84% of A Route meter readers complete their work in less than eight hours per day. Plaintiff Samuel Firestone counters that routes assigned ten and one-half hours to complete in July 1994 became eight hour routes in April 1995 when the PPR system was

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[2] Defendant points out in its Reply that the Court gave plaintiffs until February 27, 1998 to conduct discovery on how overtime wages were calculated and plaintiffs elected not to engage in further discovery. Furthermore, defendant states although it furnished plaintiffs with the payroll records for the named plaintiffs during the relevant time period, plaintiffs made no use of this information. "As such, plaintiffs assertion (at p. 4) that the PPR formula 'is not *really* the formula' that The Gas Company uses to calculate unassigned overtime is purely speculation, and further, this assertion is erroneous." Reply at 1. Defendant's point is well-taken, and plaintiffs' failure to take advantage of additional discovery cannot elevate this issue to a genuine issue of disputed material fact.

implemented. Firestone Declaration, ¶ 20. The Gas Company responds that the Unions had to make concessions that increased productivity and lowered the meter readers' pay to avoid losing their jobs altogether.

Plaintiffs argue that the PPR formula resulted in a "negative premium" and disincentive for unassigned overtime because meter readers are paid for overtime at a rate less than their regular rate of pay. *See* Ahumada Declaration, ¶ 6. Thus Local 132 of the Utility Workers' Union and its members filed several grievances protesting the implementation of the PPR system, which culminated in a facilitation proceeding held in February 1998. This grievance resulted in the elimination of the position of full-time meter readers. Ahumada Declaration, ¶ 8. A number of Local 132 members (including several of the plaintiffs) asserted that. it was impossible for meter readers to complete their assigned routes within the assigned time. These members determined that they would be unlikely to prevail in an arbitration challenging the PPR system because the arbitrator would likely conclude the PPR system did not violate the CBAs because it was implemented under the authority of the benchmarking agreement that had been agreed to through collective bargaining. "We concluded that SCGC effectively had the power under the Benchmarking Agreement either to impose the terms it wanted or to contract out meter reading." Ahumada Declaration, ¶ 9. The members ultimately failed to complete the grievance process.

The benchmarking process has since been eliminated. Ahumada Declaration, ¶ 9.

III.

Discussion

A. Standard for Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment if "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment "terminates the action without trial" and is a "judgment 'on the merits.'" Schwarzer, Tashima, and Wagstaffe, Cal. Prac. Guide: Fed. Civ. Proc. Before Trial § 14:28 (The Rutter Group 1996) (hereinafter Schwarzer). Not only is summary judgment not "disfavored," but it is "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corporation v. Catrett,* 477 U.S. 317, 327 (1986).

In a trilogy of 1986 cases, the Supreme Court clarified the standard for summary judgment. *See Celotex Corporation v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby. Inc,* 477 U.S. 242 (1986); *Matsushita Electrical Industry Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson,* 477 U.S. at 256. Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must be satisfied by affirmative admissible evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other Party's case. *See Celotex,* 477 U.S. at 325; *see also* Schwarzer §§ 14:123-141.

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response,

by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970)). Nonetheless, "the mere existence of a scintilla of evidence" is insufficient. 2Ld... at 252. As the Court explained in *Matsushita*, 475 U.S. at 586-87:

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

The rules of evidence generally govern the admissibility of facts. Schwarzer, § 14:160 (citing *Hal Roach Studios, Inc. v. Feiner & Co. Inc.,* 892 F.2d 1542, 1555 (9th Cir. 1930)). Rule 56(e) requires that declarations or affidavits submitted in support of or in opposition to a summary judgment motion "be based on personal knowledge; state 'facts as would be admissible in evidence' . . . ; and 'show affirmatively that the affiant is competent to testify to the matters stated therein[.]'" *Id.,* § 14:162. Declarations on information and belief are insufficient. *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989).

B. Federal Preemption under § 301 of the LMRA

1. Standard

Section 301 of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court having jurisdiction of the parties[.]" 29 U.S.C. § 185(a) (emphasis added). The purpose of such broad preemptive power is to prevent state courts from purporting to rule on the legal consequences intended to flow from the breach of a collective bargaining agreement, and to prevent parties from reneging on arbitration promises in a collective bargaining agreement, by "relabeling" breach of contract claims as tort claims. *Livadas v. Bradshaw,* 512 U.S. 107, 124 (1994) . Section 301 has thus been interpreted "as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers v. Lueck,* 471 U.S. 202, 209 (1985), explaining *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). The need to establish a single body of federal labor law has been found by the courts to be compelling. "The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962).

Section 301 has been broadly construed to cover most state claims that require interpretation of collective bargaining agreements. *Builders & Contractors, Inc. v. International Brotherhood of Electrical Workers,* 109 F.3d 1353, 1356 (9tj Cir. 1997). The preemptive force of the LMRA displaces any state law causes of action that require interpretation of, and are not independent of, a collective bargaining agreement. Schwarzer, Tashima, and Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial § 2:722 (The Rutter Group 1997) (hereinafter Schwarzer); *see also Franchise Tax Board v.*

Construction Laborers Vacation Trust, 463 U.S. 1. 23-24 (1983), *superseded by statute on other grounds as stated in Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988). State law is preempted by the LMRA only if the court must interpret, rather than merely refer to or examine, the collective bargaining agreement. *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 413 (1988); see also Schwarzer § 2:736. In other words, preemption is only proper if a state law claim is "substantially dependent on analysis of a collective bargaining agreement." *Id.,* citing *Allis-Chalmers*, 471 U.S. at 220. The Supreme Court instructs, "when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Livadas,* 512 U.S. at 124. Indeed, "'purely factual questions' about an employee's conduct or an employer's conduct and motives do not 'requir[e] a court to interpret any term of a collective bargaining agreement.'" *Hawaiian Airlines, Inc v. Norris,* 512 U.S. 246, 261 (1994)

Moreover, as the Supreme Court clarified in *Livadas,* "§ 301 does not disable state courts from interpreting the terms of collective bargaining agreements in resolving non-preempted claims." *Livadas*, 512 U.S. at 124 n.17.[3] State law claims are not broadly preempted if they are based on an employee's exercise of an independent or "non-negotiable," right protected by state law or public policy. Id. A nonnegotiable right cannot be bartered away through collective bargaining. Thus, "where a plaintiff contends than an employer's actions violated a state-law obligation, wholly

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[3] The Supreme Court had previously noted that it "is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of the collective-bargaining agreement for its application. Such a remedy would be preempted by § 301." *Lingle*, 486 U.S. at 407 n.7.

independent of its obligations under the CBA, there is no preemption." *Espinal v. Northwest Airlines,* 90 F.3d 1452, 1456 (9th Cir. 1996) (following *Lingle* and applying LMRA preemption test to Railway Labor Act preemption). The test is whether the evaluation of the state claim is "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers,* 471 U.S. at 213.

Courts must determine whether the state law provision confers non-negotiable rights on employers or employees independent of any right established by contract or the evaluation of the claim is inextricably intertwined with terms of a labor contract. *Allis-Chalmers,* 471 U.S. 219-20. Analysis of federal preemption "turns on the actual content of respondent's policy and its real effect on federal rights." *Livadas,* 512 U.S. at 119.

2. Application

Plaintiffs' original complaint alleged that "a dispute exists between [the Gas Company] and the Unions whether the unlawful payroll practices described herein are authorized under such Collective Bargaining Agreement." Complaint, ¶ 9. Plaintiffs' First Amended Complaint, filed March 20, 1998, makes no such allegation, and plaintiffs stress that there is no dispute over what the Unions agreed to—they seek only a determination of whether the PPR system violated state and federal wage and hour laws.

Section 3(A) of Wage Order 4, Cal. Code Regs. tit. 8 § 11340 ("Wage Order 4"), provides that an employee may not be employee more than forty hours per week or more than eight hours per day unless the employee is paid at a premium rate equal to one and one-half times such employee's regular rate for all hours worked in excess of forty per week or eight per day. *See* Exh. 1 to Plaintiffs' Opposition at 456. Section 3(G), the Overtime Exemption Provision ("OEP"), exempts from these overtime provisions

any employee "covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage." *Id.*

Plaintiffs argue the OEP is preempted by federal law because the provision penalizes union workers by withdrawing minimum standards because of union representation. The Court orally rejected this argument at the December 15, 1997 hearing. The Supreme Court has explained, "These 'opt-out' statutes are thus manifestly different in their operation (and the effect on federal rights) from the Commissioner rule that an employee forfeits his state law rights the moment a collective bargaining agreement with an arbitration clause is entered into. Hence, our holding that the Commissioner's unusual policy is irreconcilable with the structure and purposes of the Act should cast no shadow on the validity of these familiar and narrowly drawn opt-out provisions." *Livadas*, 512 U.S. at 131-32 (internal citations omitted). The NINTH Circuit rejected the argument that an exemption identical to 3(G) was invalid under *Livadas*, citing the same language. *See National Broadcasting Co. v Bradshaw*, 70 F.3d 69, 73 (9th Cir. 1995).

Plaintiffs also contend that a valid opt-out provision did not exist between April 1, 1996 and September 8, 1996 when no CBA was in effect. However, the 1994 Agreement covered this time period because when a CBA expires, the agreement remains in effect until a new one is reached. In *National Broadcasting*, the NINTH Circuit quoted a letter from the California Labor Commissioner that explained,

> [T]he division has a long-established policy that provides that the mere expiration of a collective bargaining agreement will not operate to remove the worker from coverage by the collective bargaining agreement. Absent some other unilateral action by the

> parties to the expired CBA, the terms and conditions of the agreement (except for arbitration and union recognition) continue.

70 F.3d at 71. In that case, the court found that an OEP did not apply during the period between a declared bargaining impasse and the effective date of the new CBA. The pre-impasse period, however, would have been covered by the expired agreement. Here, it is undisputed that during this time period with no effective CBA, the Gas Company continued to negotiate with the Unions and to pay its employees overtime at the same rate it had paid under the expired agreement.

In its motion to dismiss, defendant contends that plaintiffs' state overtime claim is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), because the factfinder must interpret and apply the applicable CBAs to determine how meter readers are paid—whether hourly, salary, piece-rate, or a day-rate; what their "regular rate of pay" is; whether they are paid additional wages for overtime hours and whether such wages constitute a "premium.." Thus an arbitrator should determine whether the Gas Company is paying a "premium" wage for overtime work so that the PPR falls within the OEP of Title 8, California Administrative Code § 11040(3)(G). The Court agrees.

First, Wage Order 4 cannot be said to confer nonnegotiable rights, as those who are a party to a CBA meeting certain minimum requirements are exempt. Thus, these state wage and hour law protections obviously may be bargained away through the collective bargaining process.

More importantly, the meaning of basic wage and hour terms is the subject of dispute and the CBAs govern these terms. The benchmarking letter is part of the 1994 and 1996 CBAs. The OEP does not define "premium" nor "regular rate of pay." Analysis of these terms requires more than merely referring to the CBAs. And whether the OEP applies turns on

the meaning of "premium rate of pay" and "regular rate of pay." While plaintiffs stress that the Court need not interpret any provision of the CBAs because none of their terms are disputed by the parties, this argument misses the point. What the parties think the CBAs mean is of no moment; the parties may have agreed upon an inaccurate interpretation of the CBAs. Significantly, if this matter went to trial, the CBAs would be relevant evidence on plaintiffs' overtime claim. The Court cannot conclude that this claim is independent from the CBAs because the outcome would not necessarily be the same regardless of the CBAs. The Court simply cannot say that California has created rights "wholly apart from any provision of the CBA[s]." *See Hawaiian Airlines*, 512 U.S. at 258. In fact, the Supreme Court has specifically identified claims involving overtime pay as the type of dispute traditionally resolved through arbitration. *See Allis-Chalmers*, 471 U.S. at 219-20.

It is well-settled that federal law governing § 301 claims includes a general requirement that employees exhaust grievance and arbitration procedures before bringing suit. *See Republic Steel Corporation v. Maddox*, 379 U.S. 650, 652 (1965); *Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1317 (9th Cir. 1990). Section 6.8 of the 1996 Agreement sets forth the grievance and arbitration procedure between the Gas Company and the Unions. *See* Exh. A to Declaration of Gerald T. Abbott. Although one plaintiff filed a grievance in 1996 regarding the computation and payment of overtime and the Unions initiated a request to arbitrate in 1997, the arbitration has yet to occur. *See* Abbott Declaration, ¶ 4. Plaintiffs have failed to exhaust their remedies through the grievance and arbitration process contained in the CBAs, and in fact specifically declined to do so because they believed these attempts would be unsuccessful. Therefore, plaintiffs cannot state a claim under the LMRA. Accordingly, defendant is entitled to summary adjudication of this claim.

C. Plaintiffs' Federal Overtime Claim

Section 207(a) (1) of the Fair Labor Standards Act (FLSA) requires that "no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. S 207(a) (1). Plaintiffs assert that the Gas Company violates federal law by calculating the regular rate on a daily basis rather than weekly basis.

The Gas Company has complied with the overtime requirements of the FLSA. Federal regulations permit a regular rate of pay to be calculated using a variety of time periods. "Section 548.3(b) authorizes overtime to be computed on the basis of the employee's average hourly earnings for a period longer or shorter than a workweek. It permits the payment of overtime compensation on the basis of average hourly earnings for a day, a week, two weeks or any period up to 16 calendar days, if the period is established and agreed to with the employee prior to the performance of the work." 29 C.F.R. § 548.302(b). A regular rate is determined by "totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked." 29 C.F.R. § 778.112; *see also* 29 C.F.R. § 778.111 (same for piece rates).

Plaintiffs argue that because a meter reader's base rate may fluctuate between $16.56 and $11.04 depending upon how long it takes to complete the route, this rate cannot be said to be "substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time" as required by 29 C.F.R. § 548.2(e). This interpretation would preclude the applicability of § 548.302(b), which provides for

a flexible approach to computing overtime following the collective bargaining process, as the variable time period for computing overtime is allowable "if the period is established and agreed to with the employee prior to the performance of the work." Defendant's motion for summary adjudication of the federal overtime claim is GRANTED.

Although plaintiffs' state rest break claim arises out of a common nucleus of operative fact, the Court declines to exercise supplemental jurisdiction given the resolution of the state and federal overtime claims. This is particularly appropriate where there is no longer any basis for federal court jurisdiction and neither the parties nor the Court has expended a significant amount of time on this remaining state law claim. The remaining state law claim is DISMISSED without prejudice to plaintiffs' right to re-file this claim in state court.

Conclusion

As plaintiffs concede, there is no dispute over what the Unions and the Gas Company agreed to with respect to he (sic) PPR system. Threatened with the layoff of all of the meter readers, the Unions accepted a system of compensation that lowered the number of hours credited to an employee's unassigned overtime, thus reducing the amount of money the Company would have to pay for unassigned overtime First, plaintiffs' state law overtime claim is preempted by § 301 of the LMRA because resolution of this claim is necessarily dependent upon an interpretation of the relevant provisions of the CBAs. Thus it cannot be said that this cause of action is independent of the CBAs. Moreover, plaintiffs have failed to state a claim for relief under the LMRA because they failed to exhaust the grievance procedure established by the CBAs. Second, with respect to the federal overtime claim, there are no genuine issues of material fact in dispute and defendant is entitled to judgment as a matter of law as the federal regulations permit a flexible approach to computing overtime

reached through collective bargaining. Finally, the Court declines to exercise supplemental jurisdiction over the remain state law rest break claim. Judgment shall be entered dismissing the first and second claims for relief on the merits and dismissing the third claim for relief without prejudice.

IT IS SO ORDERED.

DATED: July 14, 1998

/s/ _____
Richard A. Paez
United States District Judge

APPENDIX D

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
Second Appellate District Division Four

[Filed March 13, 2002]

B148811

JOSE MILLAN, AS LABOR COMMISSIONER OF THE STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS,
Plaintiff and Respondent,

v.

SOUTHERN CALIFORNIA GAS COMPANY,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Madeleine Flier, Judge. Reversed and remanded.

Opinion by: Hastings

OPINION:

Summary judgment was granted in favor of respondent, Jose Millan as Labor Commissioner of the State of California Department of Industrial Relations, Division of Labor Standards Enforcement in an action against Southern California Gas Company (hereinafter referred to as Employer).[1] The trial court found that application of a collective bargaining agreement between Employer and its

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[1] The motion was also brought in the name of the People of the State of California, but only the Labor Commissioner is named as a respondent in this appeal.

meter readers resulted in certain of the meter readers being paid less than required for overtime pay pursuant to a California labor regulation, Wage Order 4-89. Judgment was entered against Employer in an amount stipulated by the parties.

Three determinations were essential to the trial court's resolution of the case: (1) that federal law did not preempt application of state law; (2) that it should defer to respondent's method of calculating the equivalent hourly "regular pay" to determine whether the collective bargaining agreement was at odds with Wage Order 4-89, subdivision 3(A); and (3) that the collective bargaining exemption within Wage Order 4-89, subdivision 3(G), was not applicable.

We conclude that the trial court did not err on the issue of preemption or in deferring to respondent's method of calculating the equivalent hourly regular pay referenced in Wage Order 4-89, subdivision (A). But the court did err in its determination that the collective bargaining exemption did not apply to the collective bargaining agreement at issue. Depending on the number of overtime hours worked, application of the formula provided within the collective bargaining agreement may or may not violate the terms of Wage Order 4-89. The matter must therefore be remanded for further proceedings to determine whether in any specific instance the wage order was violated.

BACKGROUND

During the period from April 1995 through April 1998, Employer's gas meter readers were covered under a collective bargaining agreement. Through the collective bargaining process, Employer implemented a new compensation plan for its meter readers in April 1995, known as the "Pay Per Route" (PPR) program. The system in place prior to 1995 compensated the meter readers at a fixed hourly rate. Briefly stated, the PPR provided that meter readers would be paid a

flat daily rate for working routes designed with the expectation they would be finished within an eight hour period. Meter readers who took more than eight hours to finish the routes received overtime compensation for the additional hours according to a formula that divided the flat daily rate by the number of hours actually worked that day. As a result, there was no fixed overtime rate paid for hours worked in excess of eight per day.

The Industrial Welfare Commission (IWC) is the state agency empowered to formulate regulations governing employment in California. Those regulations are known as "wage orders." (Lab. Code, §§ 1173, 1178.5, 1182.) The Division of Labor Standards Enforcement, headed by respondent, Labor Commissioner, is the state agency empowered to enforce California's labor laws, including IWC wage orders. (Lab. Code, §§ 21, 61, 95, 98-98.7, 1193.5.)

The wage order at issue here is 4-89, (Cal. Code Regs., tit. 8, § 11040),[2] which provides in section 3(A): "[E]mployees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Employment beyond eight (8) hours in any workday . . . is permissible provided the employee is compensated for such overtime at not less than: [¶] (1) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours. . . ."

Subdivision 3(G) provides an exemption to the terms of subdivision 3(A) where an employee is "covered by a collective bargaining agreement if said agreement provides

[2] Section 11040 has been amended several times since 1995.

premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage."

In April 1998, respondent, the State Labor Commissioner, brought an action against Employer, alleging that the formula in the PPR calculating overtime wages constituted a violation of the state's overtime law, and seeking to recover unpaid overtime wages on behalf of the meter readers, as well as waiting time penalties for those wages as provided for by the Labor Code.

Employer asserted two affirmative defenses: (1) that respondent's complaint was preempted by federal labor laws; and (2) the PPR compensation program fell under a special exemption to the state's overtime pay laws because it was covered by a collective bargaining agreement.[3]

On February 9, 1999, Employer brought a motion for summary judgment against respondent based on its two affirmative defenses. The following day, respondent filed a motion for summary adjudication against Employer, requesting an order adjudicating that there was no merit to either of the affirmative defenses and that Employer owed a duty to pay its meter readers in compliance with state law.

Respondent asserted that the formula contained within the collective bargaining agreement is at odds with the method

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[3] On appeal, Employer contends that the action is preempted by the Federal Arbitration Act. This contention was not raised in the trial court in connection with its motion for summary judgment. We assume that Employer is referring to an arbitration clause contained in the collective bargaining agreement, as there is no arbitration clause in the PPR document. Since the issue was not first raised in the trial court and the collective bargaining agreement is not part of the record, we do not address this contention. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 824, 847; *Buckhart v. San Francisco Residential Rent etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036.)

respondent was required to use to calculate the hourly equivalent of the "regular rate of pay" referenced in Wage Order 4-89. Respondent divides the fixed daily rate by eight, the maximum number of hours that may be worked per day before overtime pay is required pursuant to Wage Order 4-89. In other words, if the fixed daily rate is $132.48, then the hourly regular rate would equate to $16.56 ($132.48 divided by 8). Using this hourly regular rate, if a meter reader worked 10 hours in one day and completed only the regularly assigned number of routes, he or she should be compensated for those two additional hours of overtime at the rate of $24.84 ($16.56 x 1.5).

On the other hand, Employer contends that the method of determining the equivalent hourly regular rate contained within the collective bargaining agreement is sanctioned by federal law, to which respondent and the courts should defer. Federal regulations provide that the "regular rate" is determined by dividing total earnings per day by total hours worked that same day. (29 C.F.R. § 778.111 and 778.112; accord *Bay Ridge Co. v. Aaron* (1948) 334 U.S. 446, 464.) Utilizing the federal method of calculation in the example above, the hourly regular rate would equate to $13.25 ($132.48 divided by 10). The meter reader would be compensated for the two additional hours of overtime at the rate of $19.87 per hour ($13.25 x 1.5). Under Employer's method, therefore, the regular rate is not fixed; an individual's regular rate can vary daily, and the more overtime hours a meter reader works, the lower his or her regular rate and overtime rate become.

On March 9, 1999, the trial court heard both motions. After taking the matter under submission, it denied Employer's motion for summary judgment and granted respondent's motion for summary adjudication. It concluded that federal preemption did not exist; that the agency's determination of its own regulation deserved great weight; and that *Skyline*

Homes, Inc. v. Department of Industrial Relations (1985) 165 Cal.App.3d 239 "still governs as to calculating overtime wages."

Employer amended its answer to assert a third affirmative defense, that it had made additional overtime payments which should be credited against any liability. The matter proceeded to trial in October 2000. At trial, Employer withdrew its third affirmative defense, respondent withdrew its second cause of action for waiting time penalties, and the parties stipulated that the amount of overtime wages due, based on respondent's interpretation as adopted by the trial court, was $286,683.87. Judgment was entered accordingly on December 8, 2000. Employer's motion for new trial was denied and it appealed.

DISCUSSION

I. Preemption

Pursuant to section 301 of the Labor Management Relations Act (29 U.S.C. § 185 (a)), federal law exclusively governs suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. (*Caterpillar Inc. v. Williams* (1987) 482 U.S. 386, 393.) Section 301 has been construed to cover most state law actions that require interpretation of labor agreements to ensure uniformity. (*Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, 403.) "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a section 301 claim or dismissed as preempted by federal labor-contract law." (*Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 220, internal citations omitted.) Preemption has also been applied when the "heart" of a state law complaint is a clause in the collective bargaining agreement (sometimes referred to as a CBA) (*Caterpillar,*

supra, 482 U.S. at p. 394), or if resolution of the state law claim depends on the meaning of or requires the interpretation of a collective bargaining agreement. (*Lingle, supra*, at pp. 405-410.) However, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by section 301." (*Allis-Chalmers, supra,* 471 U.S. at p. 211; *Caterpillar Inc., supra,* 482 U.S. at p. 396, fn. 10.)

Preemption should not be lightly inferred. (*Hawaiian Airlines, Inc. v. Norris* (1994) 512 U.S. 246, 252.) Section 301 should only be applied to "state law purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement.'" (*Livadas v. Bradshaw*, (1994) 512 U.S. 107, 123; *Builders & Contractors v. Intern. of Elec. Workers*, (9th Cir. 1997) 109 F.3d 1353, 1357.) When liability is governed by independent state law, the mere need to "look to" the collective bargaining agreement for damages computation is no reason to hold the state law claim defeated by section 301. (*Lingle, supra*, 486 U.S. at p. 413, fn. 12.) "Purely factual questions" do not require a court to interpret any term of a collective-bargaining agreement. (*Lingle v. Norge, supra*, 486 U.S. at p. 407.)

"[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." (*Livadas, supra,* 512 U.S. at p. 124; citing *Lingle, supra.*) In *Livadas*, a terminated union employee sought penalties for the period between her discharge and the date she received the wages due her. The issue raised was a question of state law, entirely independent of any understanding embodied in the collective bargaining agreement. There was no indication that there was a dispute over the amount to which the employee would be entitled as damages. (512 U.S. at p. 125.)

Very recently, the Ninth Circuit noted: "The demarcation between preempted claims and those that survive section 301's reach is not, however, a line that lends itself to analytical precision. As the Supreme Court acknowledged in *Livadas*, '[T]he Courts of Appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and [*Allis-Chalmers*].' [Citation.] And little wonder. 'Substantial dependence' on a CBA is an inexact concept, turning on the specific facts of each case, and the distinction between 'looking to' a CBA and 'interpreting' it is not always clear or amenable to a bright-line test. [Citations.]" (*Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683, 691.)

Respondent relies on *Skyline Homes, Inc. v. Department of Industrial Relations, supra*, 165 Cal.App.3d 239 to support its argument that California law, not federal law should apply.

In *Skyline*, salaried salespeople who worked a fluctuating workweek filed a claim with the Department of Industrial Relations, Division of Labor Standards Enforcement (the LSE) alleging that their employer improperly computed their overtime pay. (*Id.* at p. 244.) The relevant regulation was substantially similar to the one at issue here, providing that any employee who worked longer than 8 hours daily or 40 hours weekly would be compensated at one and one-half times the employee's regular rate. The salespeople were guaranteed a fixed minimum weekly salary, but were paid overtime compensation for all work performed over 40 hours in any given workweek. Their employer computed overtime pay in the same manner as the federal standard applied here by Employer: by dividing the employee's weekly salary by the number of hours actually worked in a given week. Under this method, as in the PPR, the more hours the employee worked, the lower the regular rate became. (*Id.* at p. 245.)

In *Skyline*, as here, the employer maintained that its method for deterring overtime pay was valid as sanctioned

under federal law. The *Skyline* court considered the conflict between federal and state law and concluded that federal law did not preempt state law because the Fair Labor Standards Act (FLSA, 29 U.S.C. §§ 201-219) specifically states that: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter." (29 U.S.C. § 218, subd. (a).) Federal regulations also provide that where state or local laws provide greater protection to the employee, they shall be interpreted to override the provisions of the FLSA. (Id. at pp. 250-251, citing 29 C.F.R. § 778.5.) The *Skyline* court concluded that since the number of hours required to be worked before the overtime rate is applied is less under state law then under federal law, the State of California provides for a lower maximum workweek, and thus comes within the express savings clause of the FLSA. (*Id.* at p. 252.)

Employer argues that *Skyline* was expressly disapproved in *Tidewater Marine Western, Inc. v. Bradshaw*, (1996) 14 Cal.4th 557 and is no longer good law.

In *Tidewater*, employees of companies that transported workers and supplies to offshore oil drilling platforms filed lawsuits against their employer seeking retroactive overtime pay. The employers responded by filing a lawsuit for injunctive relief, which was granted by the superior court. On appeal, the Supreme Court affirmed the granting of the injunction. It held, *inter alia*, that California could regulate conduct outside its territorial boundaries, and that federal law did not conflict with or otherwise preempt state regulation of the employee's overtime pay. (*Id.* at p. 566.) The *Tidewater* court, however, also considered whether the DLSE's policy for determining whether IWC wage orders apply to maritime employees constituted a regulation within the meaning of the

Administrative Procedure Act (APA, Gov. Code, § 11340, *et seq.*). It disapproved of Skyline only to the extent that it concluded that the DLSE's policy for calculating overtime was not a regulation within the meaning of the APA. (*Id.* at p. 573.) Therefore, we disagree with Employer's contention that the *Skyline* case is not applicable here.

Skyline has been followed in *Alcala v. Western AG Enterprises*, (1986) 182 Cal.App.3d 546, *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721 and *Ghory v. Al-Lahham*, (1989) 209 Cal.App.3d 1487. It is clear that *Skyline* remains good law with respect to the proposition that the State may use its own definition of "regular rate" and may set its own standards regarding the adequacy of overtime pay as long as it does not fall below the federal standards. Moreover, *Skyline* is consistent with the principle that establishment of labor standards falls within the traditional police power of the State. (*Fort Halifax Packing Co. v. Coyne*, (1987) 482 U.S. 1, 21; *Lingle v. Norge, supra*, 486 U.S. at p. 411.)

Employer also attempts to distinguish *Skyline,* arguing that the PPR provides for compensation on a "piece-rate" basis, not an hourly basis. We disagree with this characterization. As the trial court noted, Employer's pay rate is truly a hybrid system. Routes are categorized as to "difficulty." The meter readers are assigned a certain number of routes to complete during a given day, based largely on the difficulty assessment. The assignments are made assuming a traditional eight-hour work day. Compensation is based upon completion of that number of routes but is also based on a predetermined number of hours. If, however, a meter reader consistently does not complete that number of routes in eight hours, it may affect his or her performance rating, and may effect a reassignment of routes. Meter readers cannot simply choose how many routes they wish to complete in a day—they are penalized or reassigned if they cannot finish the number prescribed. Neither may they choose to complete more

than the specified number—that option must be specifically assigned by Employer. The amount of pay is specifically fixed as a "per hour assigned" amount in the PPR. Employer's computer payroll system is based on an eight hour day and 40-hour workweek, although Employer goes to elaborate lengths to "fool" the computer system. It is clear that the PPR is not truly a piece-rate system, and thus we cannot avoid following *Skyline* on that basis.

In its briefs, Employer relied extensively on *Firestone v. Southern California Gas Co.*, (9th Cir. 2000) 219 F.3d 1063, a case brought against Employer in this case by four meter readers regarding the same 1995 PPR at issue here. The case was not certified as a class action.

During the briefing process, a petition for rehearing was filed, and the Ninth Circuit issued an order deferring action on the petition pending the completion of proceedings in *Cramer v. Consolidated Freightways, Inc., supra*, 255 F.3d 683. An opinion in *Cramer* was filed in June 2001.

After this case had been argued and submitted, on February 12, 2002, the Ninth Circuit Court of Appeals denied a rehearing in *Firestone* and issued an opinion, concluding that there was no change in result necessitated by the *Cramer* opinion. The opinion affirmed that the claim of the meter readers was preempted by the LMRA because, "The parties in this case disagree about which rate in the contract is the 'regular' rate and, thus, disagree on whether plaintiffs are receiving a 'premium' for overtime work. Resolving this question, we held, requires interpretation of the agreement. The agreement would be enforced differently depending on which party's interpretation is accept. [¶] We conclude that *Cramer* does not change this result. Resolution of plaintiffs' claim to overtime pay under state law cannot be decided by mere reference to unambiguous terms of the agreement." 255 F3d 683 (2002 WL 207025.)

This case does not present a disputed disagreement over interpretation of the collective bargaining agreement. The parties do not dispute how Employer calculates the overtime wages. Thus, the issue is not how to resolve a dispute over the interpretation of the PPR, but a legal question of whether the PPR complies with state law.

Turning to the facts of this case, the PPR does not define "regular rate" of pay. The PPR specifies that "qualified" meter readers are paid "$12.38 per hour assigned," except for overtime conditions. Apparently this hourly rate is set pursuant to the collective bargaining agreement and may vary from year to year. "Unassigned overtime premiums" are paid when a meter reader takes longer than eight hours to complete a certain number of routes. This is distinguishable from "assigned overtime" which occurs when a meter reader is asked to complete more than the normally assigned number of routes, regardless of the number of hours worked. It is the unassigned overtime premium with which we are here concerned.

According to the literal language of the PPR, in unassigned overtime, the number of hours actually worked is multiplied by the ratio of assigned hours over actual hours. The resulting product is multiplied by a complex formula, which yields a number of "overtime hours" that is only a fraction of the number of actual hours worked in excess of eight. The PPR goes on to explain that the Employers' payroll system was not designed to accommodate this method of payment, and thus it is necessary to "fool the payroll system" by posting all compensation on an hourly basis, and then the hourly wage for overtime hours is multiplied by 1.5.

We need not interpret the complex formula set forth in the PPR because the parties do not dispute that, in actuality, Employer computes the overtime compensation as follows: the daily rate is divided by the number of actual hours worked, which results in a figure which represents the

"regular rate" of compensation and then one and one-half times the regular rate is paid for hours worked in excess of eight. In other words, the formula in the PPR works out to be the same calculation allowed under federal law.

California law provides clear standards regarding rates of overtime pay which establish rights independent of a collective bargaining agreement. An employer and a union cannot bargain away an employee's rights under state wage statutes. (Lab. Code, § 219; *Allis Chalmers v. Lueck, supra,* 417 U.S. at p. 212, *Balcorta v. Twentieth Century-Fox Film Corp.* (9th Cir. 2000) 208 F.3d 1102, 1111.) Nor may a defendant attempt to inject a federal question into an action that asserts what is plainly a state law claim and transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. (*Caterpillar Inc. v. Williams, supra,* 482 U.S. at p. 399; *Cramer v. Consolidated Freightways, Inc., supra,* 255 F.3d at p. 694.) Here, although the overtime compensation scheme is computed according to a complex mathematical formula in the PPR which equates with the federal standard, the parties do not dispute how overtime is calculated. Thus, even though the factual inquiry will necessarily include reference to the collective bargaining agreement, no preemption occurs. (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 368.)

II. The Collective Bargaining Exemption

At this point we turn to a discussion of the exemption which is contained within subdivision (G) of Wage Order 4-89. It exempts employers from the provisions of subdivision (A) where a "collective bargaining agreement . . . provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage."

As we have previously noted, Wage Order 4-89 was promulgated by statutory authority granted to the IWC and is enforced by the Division of Labor Standards Enforcement. We agree with the trial court that we should defer to respondent's interpretation of its wage order in calculating the amount of "regular pay." (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, p. 12-13.)

Respondent's interpretation of this exemption is succinctly stated in its brief on appeal: "The exemption establishes a less exacting standard of overtime compliance for employers covered by a [collective bargaining agreement]: in particular, it eliminates the specific premium wage rates set out in subdivision 3(A) and authorizes the parties to negotiate whatever premium wage rates above the regular rate of pay they may deem appropriate for the broad range of hours constituting overtime work."

As we read this exemption in connection with subdivision 3(A), the parties to a collective bargaining agreement which provides for payment of a "cash wage rate" of at least one dollar more than the minimum wage are free to negotiate the manner of calculating overtime pay without considering the terms of subdivision 3(A) as long as a "premium" is paid. The State DLSE manual defines "premium" as any amount above "regular pay." (DLSE Enforcement Policies and Interpretations Manual § 1085; *Accord, Bay Ridge Co. v. Aaron, supra,* 334 U.S. at p. 465.) Respondent figures the "regular pay" by dividing the flat daily rate by eight. Using the figures from above, this results in a regular hourly rate of $16.56. Thus, anything paid above this amount qualifies as a "premium."

Turning to the PPR, and assuming that the meter reader worked a total of ten hours, we divide $132.48 by 10 resulting in $13.25 per hour. Multiplying $13.25 per hour by 1.5 equals an overtime rate of $19.88. This is more than $16.56, so it qualifies as a premium and the exemption

applies. But, as previously noted, a problem may be encountered as additional overtime hours are worked. For example, if 12 hours are worked, the rate of pay would not qualify: $132.48 divided by 12 equals $11.04 which, multiplied by 1.5, equals $16.56.

Employer concedes that the results of a study done over one three-month period found one occasion where a meter reader took more than 12 hours to complete the routes. In only 2 percent of the cases did the routes take more than 11 hours. Thus, it appears that under the most typical scenario, the PPR does provide for a "premium" above the "regular pay" and the exemption would apply. But, because there was at least one time it would not have applied, the court did not err in denying Employer's summary judgment motion. The matter must be remanded to the trial court for a determination of how many occasions application of the PPR resulted in a failure to qualify for the exemption and for calculation of damages, if any.

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with directions to vacate its orders granting summary judgment and denying summary adjudication and to enter new and different orders denying those motions in accordance with the principles set forth in this opinion and setting the matter for trial to adjudicate whether application of the PPR has resulted in failure of Employer to pay a premium over the regular pay of $16.56. Costs on appeal are awarded to appellant.

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

APPENDIX E

Labor Management Relations Act, 1947

Section 301, 29 U.S.C. § 185

Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX F

INDUSTRIAL WELFARE COMMISSION
ORDER NO. 4-89

REGULATING WAGES, HOURS, AND WORKING CONDITIONS IN PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL, AND SIMILAR OCCUPATIONS

Article 4. Professional, Technical, Clerical, Mechanical, and Similar Occupations (Order No. 4-89) Sec. 11040. Order Regulating Wages, Hours, and Working Conditions in Professional, Technical, Clerical, Mechanical and Similar Occupations.

Effective July 1, 1989

1. APPLICABILITY OF ORDER. This Order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by an industry order of this Commission, except that:

(A) Provisions of Sections 3 through 12 shall not apply to persons employed in administrative, executive, or professsional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month; or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the

following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting, or is engaged in an occupation commonly recognized as a learned or artistic profession; provided, however, that registered nurses shall not be considered to be exempt professional employees for the purposes of this subsection (2) of this order, unless they individually meet the administrative, executive, or professional criteria described in subsection (A)(1) above.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. DEFINITIONS.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Professional, Technical, Clerical, Mechanical, and Similar Occupations" includes professional, semi-professional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to the following: accountants; agents; appraisers; artists; attendants; audio-visual technicians; bookkeepers; bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator

operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radio-telephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(I) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(J) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(K)"Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time. Within the health care industry, the term "primarily" as used in Section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and/or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

(L) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(M) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(N) "Wages" (See California Labor Code, Section 200)

(O) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(P) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. HOURS AND DAYS OF WOR

(A) The following overtime provisions are applicable to employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are not required by law to attend school: such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1½) times the employee's regular rate of pay for all work over eight (8) hours in any workday or in excess of forty (40) hours in any workweek. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday, and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek.

(B) No employer shall be deemed to have violated the provisions of this Section 3, Hours and Days of Work, by instituting, pursuant to a written agreement voluntarily executed by the employer and by at least two-thirds (2/3) of the employees in the affected work unit following a secret ballot and before the performance of the work, a regularly

scheduled week of work consisting of such hours and days as shall be agreed upon consistent with both of the following provisions: the premium wage rate provisions of one and one-half (1½) times the employee's regular rate of pay shall apply to all hours worked in any workday in excess of the regularly scheduled hours established by the agreement for that workday up to twelve (12) hours a workday, or to all hours worked in excess of 40 hours per week; and the premium wage rate provisions of double the employee's regular rate of pay shall apply to all hours worked in excess of twelve (12) hours per day and to all hours worked in excess of eight (8) hours on those days worked beyond the regularly scheduled number of workdays in the written agreement.

(1) Prior to the secret ballot vote, any employer who proposes to institute an alternative schedule shall make a disclosure in writing to the affected employees, including the effects of the proposed schedule on the employees' wages, hours, and benefits. Such a disclosure shall include meetings duly noticed, for the specific purpose of discussing the effects of alternative scheduling. Failure to comply with this section shall make the election null and void.

(2) Any employer who institutes a regularly scheduled week of work pursuant to this subsection shall make a reasonable effort to find an alternative work assignment for any employee who participated in the vote which authorized the schedule and is unable or unwilling to work it. An employer shall not be required to offer an alternative work assignment to an employee if an alternative work assignment is not available or if the employee was hired after the adoption of the alternative schedule.

(3) After a lapse of twelve (12) months and upon petition of one-third (1/3) of the affected employees, a new vote by secret ballot shall be held and a two-thirds (2/3) vote of the affected employees will be required to reverse the

agreement above. If such agreement is revoked the employer shall comply within sixty (60) days. Upon a proper showing by the employer of undue hardship, the Division may grant an extension of time for compliance.

(4) For purposes of Section 3(B), affected employees may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met.

(C) Provisions of subsections (A) and (B) above shall not apply to any employee whose earnings exceed one and one-half (1½) times the minimum wage if more than half (½) of that employee's compensation represents commissions.

(D) One and one-half (1½) times a minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek except that minors sixteen (16) and seventeen (17) years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsections (A) or (B) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $100 to $5,000 as well as to criminal penalties provided herein. Refer to California Labor Code Sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors.)

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

(F) If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m.,

facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(G) Except as provided in subsections (D), (F) and (I), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

(H) The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, or (2) Title 13 of the California Code of Regulations, Subchapter 6.5, Section 1200 and following sections, regulating hours of drivers.

(I) No employee shall be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency as defined in Section 2(D).

* * * *

12. REST PERIODS. Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.